No. 898

# In the Supreme Court of the United States

OCTOBER TERM, 1967

JOHNNY SABBATH, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## CITATIONS





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## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the court of appeals (R. 54–58) is reported at 380 F. 2d 108.

### JURISDICTION

The judgment of the court of appeals was entered on June 27, 1967 (R. 59). The petition for a writ of certiorari was filed on August 25, 1967, and was granted on December 11, 1967 (R. 61). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether petitioner's arrest is rendered invalid by reason of the agents' failure to comply with the an-

nouncement rule of 18 U.S.C. 3109 prior to opening the closed but unlocked door of petitioner's apartment.

2. Whether petitioner's arrest and the incidental search which followed were invalid because the agents failed to seek a warrant, although they allegedly had time to do so.[1]

## STATUTE INVOLVED

18 U.S.C. 3109 provides as follows:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

26 U.S.C. 7607 provides in pertinent part:

> The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401 (*i*), of the Tariff Act of 1930, as amended; 19 U.S.C., sec. 1401(*i*)), may—
>
> * * * * *
>
> (2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.

[1] This question is argued in petitioner's brief but was not raised in his petition.

## STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Southern District of California of knowingly importing cocaine and concealing and facilitating the transportation and concealment thereof, in violation of 21 U.S.C. 173 and 174. He was sentenced to concurrent terms of imprisonment for ten years (R. 2–3, 50–52). The court of appeals affirmed (R. 54–58).

On February 19, 1966, William Jones, who was returning to Los Angeles from a visit to Tijuana which he had made in the company of petitioner, was detained at the border by customs agents, who found an ounce of cocaine in his possession. Jones was also carrying a card on which was written the name "Johnny" and a Los Angeles telephone number (R. 6–8, 24, 31, 43). On the following day, at about 3:00 p.m., Jones made a call to this number while a customs agent, with Jones' permission, listened in. The agent dialed the number and a male voice responded on the telephone. Jones addressed this man as "Johnny", and referred to himself as "B. J." Jones said he was still in San Diego and still "had his thing." The other man asked Jones if he had any trouble getting through the line, and Jones said he did not. The other man said that he had had some trouble and that he would tell Jones about it when he saw him. Jones said that he was on his way up (R. 8, 42–44).

At about 7:30 that evening, the customs agents placed a small broadcasting device on Jones, returned

the package of cocaine, and accompanied him to an apartment building in Los Angeles. They listened through a receiving apparatus while Jones knocked on the door and a woman answered. Jones asked if Johnny was in and was told to wait a minute. Steps were heard and then a man asked Jones if he had any trouble getting through the line, to which Jones responded negatively. Although reception was poor because of the volume of a phonograph player inside the apartment, the agents were able to hear a discussion about a "package" (R. 19–22).[2]

The agents waited five to ten minutes before they decided to arrest petitioner. During most of this time they were uncertain as to what was taking place in the apartment because of the continued noise from the phonograph. One of the agents knocked on the door, waited a few seconds, and, receiving no response, opened the unlocked door and entered the apartment. At least one of the agents had his gun drawn. They saw petitioner seated on a couch, in the process of withdrawing his hand from under the cushion on which he was seated. After placing petitioner under arrest, one of the agents looked under the cushion and found the package of cocaine which they had returned to Jones before he entered the apartment (R. 23–24, 26–27, 39, 45–46). A search of the apartment revealed approximately $500 in cash and a quan-

[2] Jones corroborated this account, giving more details. He said that he was very nervous, because he had never been in this kind of a situation before (R. 10–18). He forgot to ask petitioner for his hundred dollars (R. 13).

tity of materials adapted to packaging cocaine (R. 27, 47–48).

No pre-trial motion to suppress was made. The only objection to the admission of the seized cocaine into evidence was based on the ground that the agents did not have sufficient probable cause to arrest petitioner without a warrant.[3] The court denied the motion to exclude the evidence (R. 28–29). Petitioner urged for the first time on appeal that the manner of entry was improper, and the court of appeals considered and overruled this contention. At no time prior to the filing of his brief in this Court did he urge that the narcotics should have been suppressed because there was time to obtain a search warrant.

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[3] Out of the hearing of the jury, the following objection was made (R. 28):

Mr. BRADLEY: Now, your Honor, in view of this officer's testimony, in view of this agent's testimony that he went to this apartment without a warrant, with the intention of arresting the occupants, and the only information that he is relying upon was the information given to him by Jones, and he, Jones, he had never seen before in his life, there is no evidence to establish whatsoever that Jones is a reliable informant, sufficient to justify this officer's breaking into somebody's apartment without a warrant—

The COURT: No, but what he heard over the radio transmitter confirmed what was told him.

Mr. BRADLEY: Well, that is pure speculation that it confirms anything because all he testified to—

The COURT: Well, I know, but isn't that sufficient?

Mr. BRADLEY: Not pure speculation; he must have reasonable cause.

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## SUMMARY OF ARGUMENT

### I

Since petitioner did not claim at trial that there had been an illegal entry, the record does not clearly establish that the agents failed to announce their purpose before they entered his apartment by opening a closed but unlocked door.

Even if it is assumed, however, that no announcement was made, the entry did not violate the applicable standards set forth in 18 U.S.C. 3109, which codifies the common law "rule of announcement." Section 3109 does not prohibit all unannounced entries into private residences. The statute is violated only where the officers "break open" a door without first announcing their purpose and being refused admission by the owner. Since the function of Section 3109 is to instruct law enforcement officers with respect to their authority, the words of the statute should be interpreted in accordance with their ordinary and generally accepted meaning. In common understanding, "break open" connotes the forcible destruction of a locked door; it does not include an entry by turning the knob of an unlocked door.

In order to bring the type of entry involved in this case within the announcement rule, petitioner urges, in effect, that Section 3109 be read as if it did not include the word "break." This interpretation is inconsistent with the common law antecedents of the rule of announcement. The English cases which gave first expression to the rule and which charted its subsequent development show that an announcement

was required only where entry was to be made by forcing open a locked door. Its purpose was to avoid destruction and the provocation of violence. Where the officers found the door open, or where entering would not involve the destruction of a lock, an announcement was not required. It is immaterial, moreover, that entry through a closed but unlocked door constitutes a burglary in some jurisdictions. There is no evidence that Congress intended that Section 3109 should be interpreted as if it were a prohibition against burglary, and there is no logical justification for determining the lawfulness of the conduct of a police officer, who has a right to enter the premises against the owner's wishes, by reference to laws which prohibit entry by a person who intends to commit a felony.

To the extent that the rule of announcement is related to considerations of privacy, we submit that the conduct of the officers in the present case fully satisfies the Fourth Amendment's standard of reasonableness. Considerations of privacy do not compel an extension of the announcement requirement to an entry through an unlocked door. Contrary to petitioner's assertion, the rule of announcement does not establish standards for non-permissive entries; an officer armed with a warrant or acting under probable cause has the right to enter without the owner's permission in all events. The essential interest in privacy to be protected by the rule of announcement is to avoid the shock of a sudden and forcible intrusion. The established common law distinction between forcible and

non-forcible entries is adequate to satisfy this interest.

Even if the rule of announcement should be held to apply to an entry through an unlocked door, the agents' alleged failure to make an announcement was justified by the exigent circumstances of the present case. The agents had placed an untried informer in a dangerous situation which left little margin for error.

II

The additional question which petitioner now raises for the first time—that the arrest was invalid because the agents failed to obtain a warrant although they allegedly had time to do so—is not within the grant of certiorari. In all events, the failure to obtain a warrant did not invalidate the arrest. Even if the agents lacked probable cause for petitioner's arrest at the time he contends they should have sought a warrant, the denial of a warrant would not have prevented them from continuing their investigation, as they in fact did. Probable cause was clearly established when the agents overheard petitioner's conversation with the informer in petitioner's apartment, and at that point it was not practicable to seek a warrant or to delay the arrest.

## ARGUMENT

### I. PETITIONER'S ARREST BY FEDERAL AGENTS WHO ENTERED HIS APARTMENT BY OPENING AN UNLOCKED DOOR WAS LAWFUL UNDER THE "RULE OF ANNOUNCEMENT" CODIFIED IN 18 U.S.C. 3109

The principal issue of law in this case is presented by petitioner on the assumption that the agent did not announce his purpose prior to entering petitioner's

apartment. The only support for this assumption is the inference which petitioner draws from the fact that the agent did not affirmatively testify that he had made an announcement. However, in view of petitioner's failure to object at trial to the manner of entry, there was no occasion to explore in detail the circumstances which prompted the officers to enter when and as they did. Although we discuss the merits of the issue on the assumption of fact made by petitioner and the court below, we adhere to the views expressed in our brief in opposition to the petition that this issue is not properly presented by the record. See *Giordenello* v. *United States*, 357 U.S. 480, 488.

A. ENTRY BY MEANS OF OPENING A CLOSED BUT UNLOCKED DOOR IS NOT A BREAKING OPEN OF THE DOOR WITHIN THE MEANING OF 18 U.S.C. 3109

We agree with the court below (R. 56–57) and the petitioner (Br. 17–18 & nn. 11–12) that the legality of arrests by federal officers for federal offenses should be determined by reference to federal law, and that the appropriate source of federal law on the issue presented by this case is 18 U.S.C. 3109. Although Section 3109, by its terms, applies only to the execution of search warrants, it embodies established standards of conduct governing entry into private homes which would seem to be equally applicable to situations involving entry for the purpose of making an arrest.

1. Used in their ordinary and generally accepted sense, the words "break open" in Section 3109 do not mean an entry by turning the knob of an unlocked

door. The first reference in matters of statutory construction is to the literal meaning of the words employed. *Flora* v. *United States*, 357 U.S. 63, 65. The words are to be taken in their ordinary sense and according to the common understanding. *Rathbun* v. *United States*, 355 U.S. 107, 109; *Crane* v. *Commissioner of Internal Revenue*, 331 U.S. 1, 6. These precepts are especially apposite here since the statute is an instruction to federal officers regarding their authority to use force. The situations in which an officer must consider the scope of that authority are likely to require immediate response, without time to consider alternatives beyond the ordinary connotation of the words. It is scarcely the common understanding that turning the knob of an unlocked door is a breaking open of the door. To reach the result which petitioner urges would require that the statute be read as if it did not include the word "break."

Also, of course, all portions of the statute must be considered in ascertaining its meaning. *National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 282, 288. Section 3109 says that officers may not only break open outer doors; they may break open inner doors, any part of the house, or anything therein. If "break-open" means no more than open, as petitioner contends, these provisions are oddly superfluous. Surely officers armed with a search warrant would be entitled to turn the knobs on any inner doors, and open chests, drawers, boxes, and closets. Otherwise their right to search would be meaningless. With regard to the phrase, "when necessary to liberate himself", would an officer need specific authority to turn a doorknob to go out? Only by giving the words "break open" their natural meaning are these provisions comprehensible.

With the exception of the District of Columbia Circuit cases on which petitioner relies (Br. 30–31), the courts of appeals have held that "breaking", as used in Section 3109, means forcible entry. *United States* v. *Conti*, 361 F. 2d 153, 157 (C.A. 2); *United States* v. *Monticallos*, 349 F. 2d 80, 82 (C.A. 2); *United States* v. *Garnes*, 258 F. 2d 530, 533 (C.A. 2), certiorari denied, 359 U.S. 937; *United States* v. *Hassell*, 336 F. 2d 684 (C.A. 6), certiorari denied, 380 U.S. 965; *United States* v. *Williams*, 351 F. 2d 475, 477 (C.A. 6).[4]

2. The common law antecedents of Section 3109 show that the "breaking open"—which the statute implicitly forbids in the absence of prior announcement of authority and purpose—referred, from its earliest expression, to the common understanding of a violent forcing of locked doors. *Semayne's Case*, 5 Co. Rep. 91a, 11 E. R.C. 629, 77 Eng. Rep. 194 (1603), involved the execution of a civil writ of attachment for goods on private premises, but the Court of King's Bench went beyond the immediate question to resolve related issues, including the authority of the sheriff forcibly to enter a private house in order to

[4] The prior decisions in the Ninth Circuit are also in accord with the decision below. See *Ng Pui Yu* v. *United States*, 352 F. 2d 626, 632; *Hopper* v. *United States*, 267 F. 2d 904, 908; *Williams* v. *United States*, 273 F. 2d 781, 792–793, certiorari denied, 362 U.S. 951. Although an entry by opening a locked door with a passkey obtained without the owner's consent, as in *Munoz* v. *United States*, 325 F. 2d 23, presents a more difficult problem, this type of entry could be held to be a "breaking," consistently with the interpretation urged in the text, because the unauthorized use of the passkey defeats the owner's attempt to seal his door. See pp. 19–21, *infra*.

execute a writ issued at the government's instance (77 Eng. Rep. at 195–196):

> In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K.'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors; * * * for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party * * *.

It is clear from subsequent statements in the opinion that the rule of announcement was limited to an entry by forcing open a locked door; the court went on to say that an officer "may open the doors which are shut, and *break them, if he cannot have the keys;* which proves, that he ought first to demand [the keys] * * *" (*id.* at 196, emphasis added). And in discussing the arrest of an accused under indictment for trespass, the court again distinguished between opening a closed door and breaking a locked door (*ibid.*):

> (T)he sheriff may break his house to arrest him; but in such case, if he breaks the house when he may enter without breaking it (that is, on request made, or if he may open the door without breaking), he is a trespasser.

As the first quotation from *Semayne's Case* indicates, the purpose of the rule of announcement was to avoid needless "destruction or breaking" of a

house by giving the owner an opportunity to acquiesce in the sheriff's mission. In an age when the protection of person and property from outlaws was initially, and often solely, the responsibility of each individual, the rule primarily reflected a concern for preserving an individual's defenses against intruders, except where he willfully imposed them against the King's process. To the extent that notions of an individual's right to privacy in his home underlay the rule, it is evident that these values were subordinate, for the court indicated that if the sheriff found the door open, he could enter without announcement, even for the purpose of executing a civil writ on behalf of a private party (*id.* at 197). Although we know of no English case in which the court dealt specifically with the question whether an officer exceeds his authority by making an unannounced entry through a closed but unlocked door, we find nothing which would support the theory that such an entry would be held unlawful. Indeed, by emphasizing that the purpose of the rule was to avoid unnecessary violent entries, subsequent cases and commentary suggest that the requirement of announcement would be confined to instances where an officer forced open a locked door.[15] This view is confirmed by the comparatively modern case of *Ryan* v. *Shilcock,* 7 Ex. 71, 155 Eng. Rep. 861 (1851), in which the court held that a landlord's entry into his tenant's premises by removing a staple used to keep the door closed was not unlawful. Pollock C.B. stated the

[15] See, *e.g.*, *Lloyd* v. *Sandilands*, 8 Taunt. 250, 129 Eng. Rep. 379 (1879); 1 East, *Pleas of the Crown* 323 (1803).

question and its resolution as follows (155 Eng. Rep. at 862):

> [W]hether a landlord, who on coming to his tenant's premises for the purpose of distraining finds the outer door closed, but capable of being opened by lifting a latch, is justified in so doing. We are of opinion that the landlord has authority by law to open the door in the ordinary way in which other persons can do it, when it is left so as to be accessible to all who have occasion to go into the premises.

3. Contrary to petitioner's contention (Br. 20–24), there is no evidence that Congress intended to incorporate the common law definition of burglary as the substance of the words "break open" in 18 U.S.C. 3109. Section 3109 has no helpful legislative history. It was derived from certain provisions of the Espionage Act of 1917,[5] which in turn were "based on the New York law on this subject" (H. Rep. No. 69, 65th Cong., 1st Sess., p. 20). Seizing upon this comment, petitioner argues that entry by opening an unlocked door is a breaking under Section 3109, because such an entry constituted a burglary under New York law and because the New York Supreme Court had indicated in an 1841 decision that "what would be a breaking of the outer door in burglary, is equally a breaking by the sheriff" (*Curtis* v. *Hubbard,* 1 Hill 336, 338, affirmed, 4 Hill 437). This is quite unpersuasive. The "New York law" which Congress borrowed in 1917 is found in Sections 799 and 800 of the New York Code of Criminal

[5] Espionage Act of 1917, Title XI, Sections 8 and 9, 40 Stat. 229.

Procedure of 1881.[6] These provisions—which are virtually identical to the comparable sections of the Espionage Act, and which are the source of the language in 18 U.S.C. 3109—merely restate the common law rule of announcement and two of its traditional exceptions. The reasonable inference to be drawn from the enactment of the federal legislation is that Congress intended to adopt the basic principles of the rule of announcement rather than the particular law of one jurisdiction. Moreover, there is no indication that Congress, in 1917, considered or was even aware of *Curtis* v. *Hubbard*. It cannot fairly be said that Congress intended to incorporate a statement from that obscure decision in the federal statute. *Yates* v. *United States*, 354 U.S. 298, 309–310.

Moreover, as authority for the proposition that the lawfulness of a policeman's entry to make an arrest is to be determined by reference to the law of burglary, *Curtis* v. *Hubbard* does not bear the weight which petitioner assigns to it. The issue in the case involved the execution of a civil process, and the full opinion makes clear that the statement on which petitioner relies is to be limited to those facts. Viewed

[6] § 799. The officer may break open an outer or inner door or window of a building, or any part of the building, or any thing therein, to execute the warrant, if, after notice of his authority and purpose, he be refused admittance.

§ 800. He may break open any outer or inner door or window of a building, for the purpose of liberating a person, who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation.

in that context, the statement is in accord with the rule which had been established prior to *Semayne's Case* that a sheriff's right to enter a house to execute a civil writ is much more limited than his right to enter when armed with a criminal process. See Y.B. 13 Edw. IV, fol. 9, translated in *Burdett* v. *Abbot,* 14 East 1, 117, 104 Eng. Rep. 501, 546. In *Semayne's Case,* the court held that the right to make a forcible entry did not extend to the execution of a civil process (77 Eng. Rep. at 198). And this rule has been reaffirmed in subsequent English and American cases.[7] To whatever extent the burglary analogy may have application in a case involving the execution of a civil process, petitioner cites no authority which would support an extension of that doctrine to the present case.[8]

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[7] See Blakey, *The Rule of Announcement and Unlawful Entry—Miller v. United States and Ker v. California*, 112 U. Pa. L. Rev. 499, 501–502, 504–505 (1964).

[8] Petitioner cites (Br. 21) a passage in Voorhees, *Law of Arrest* § 172 (1904) which purports to extend the burglary analogy, but the only authority which the textwriter cites is *Curtis* v. *Hubbard*, *supra*—a decision which involved only the execution of a civil process. Petitioner also relies (Br. 23) on the following quotation from Wilgus, *Arrest Without a Warrant* (Pt. 2), 22 Mich. L. Rev. 798, 806 (1924):

"What constitutes 'breaking' *seems to be* the same as in burglary: lifting a latch, turning a door knob, unlocking a chain or hasp, removing a prop to, or pushing open, a closed door of entrance to the house—even a closed screen door * * *." (Emphasis added.)

In support of this rather qualified assertion, Professor Wilgus cites a note in 61 American Decisions, Voorhees' *Law of Arrest*, *supra*, §§ 183–190, and some twenty-two American and English decisions. The cases, however, do not support the text.

Apart from the lack of legislative history or common law precedent to support petitioner's argument, we see no logic or practical justification for defining the scope of an officer's right to make an unannounced entry for the purpose of effecting a lawful arrest by the application of rules which proscribe the conduct of a person who enters for the purpose of committing a felony. The societal interests concerned in the application of the rule of announcement and the law of burglary are significantly different. Society has a substantial interest in the success of the officer's attempt to make an arrest; it is deeply opposed to the burglar's achievement of his objective. When the burglary laws are applied, society's interest lies in rules which narrowly limit the types of entries which a person may make without subjecting himself to criminal penalties.[9] But the officer, unlike the felon,

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With the exception of four irrelevant English decisions on execution of civil writs and one American decision on attachment, which has no possible pertinency, they all involve criminal prosecutions in which it was held that there had been a sufficient breaking to constitute burglary or its statutory equivalent. None of the cases made any reference to the right of a sheriff to enter or break doors for the service of process, either civil or criminal. Petitioner also cites a number of decisions from New York and other jurisdictions where burglary convictions were sustained over a defense contention that there was no breaking. None of these cases discussed a sheriff's right to enter, or compared that type of entry to breaking by a felon.

[9] See Note, *A Rationale of the Law of Burglary*, 51 Colum. L. Rev. 1009, 1013–1014 (1951). As one of the "tangle of incongruous distinctions" in the law of burglary, it is noted that "breaking" as a necessary element in all degrees of burglary had been retained in only eighteen jurisdictions.

has the right to enter the premises in order to make an arrest. In the application of the announcement requirement, society's interest favors rules which will not unduly impair the officer's effectiveness. And to the extent that there must be limitations on an officer's right to make an unannounced entry, it is clear that such restrictions have no common purpose with the laws against burglary. Therefore any similarity in the result in the application of these two laws should be purely coincidental, and not the product of a deliberate transfer of rules from one body of law to the other.

B. AN UNANNOUNCED ENTRY IN THE CIRCUMSTANCES OF THIS CASE WAS REASONABLE UNDER FOURTH AMENDMENT STANDARDS AND THEREFORE DID NOT VIOLATE ANY PROTECTION OF THE RIGHT TO PRIVACY GUARANTEED BY SECTION 3109

This Court's decisions in *Ker* v. *California,* 374 U.S. 23, and *Miller* v. *United States,* 357 U.S. 301, lend support to petitioner's argument that the rule of announcement codified in Section 3109 is designed in part to protect the right to privacy guaranteed by the Fourth Amendment. The opinions of Mr. Justice Clark and Mr. Justice Brennan in *Ker* indicate that a police officer's method of entry into a private residence, to arrest or to search, presents an issue of constitutional dimension. The decision in this case, like the decision in *Miller,* ultimately may rest on non-constitutional grounds—either the provisions of Section 3109 or the exercise of this Court's supervisory powers. But it is apparent that the policies which underlay the decision in *Miller* are derived from the same source as the Fourth Amendment protection

against unannounced entry which at least four Justices applied in *Ker*. We accordingly argue that our interpretation of the statute and defense of the agents' actions fully satisfy the Fourth Amendment's standard of reasonableness.

Beginning with the assumption that the Fourth Amendment affords a householder some protection against unannounced entries by the police, we submit that this right, like other Fourth Amendment rights, is qualified by the fact that the Amendment proscribes only unreasonable police conduct. If entry without announcement was not unreasonable in the circumstances of this case, petitioner's arrest was lawful, and the evidence seized incident to the arrest was properly admitted at trial. The right is further qualified by the long, common law evolution of the rule of announcement, which teaches that the rule is to be applied only to certain types of entries, determined by the degreee of force through which entry is achieved. Therefore, the reasonableness of the agents' failure to announce their authority before entering involves two related questions: whether the method of entry is of a type which, as a general rule, should require a prior announcement; and if so, whether there were exigent circumstances which excused the alleged failure to do so in the instant case.

*1. The Fourth Amendment does not require an officer to give an announcement prior to entering through an unlocked door.*

In *Miller* v. *United States, supra*, this Court, drawing on the concept of a right to privacy, held that the rule of announcement applied, as it did at common

law, to an entry which was achieved by forcing open a locked door. But the fact that considerations of privacy—as well as the avoidance of destruction and violence—are of some relevance here does not require one to ignore the differences between violent and non-forcible entries. The unannounced breaking of a lock—the only device whereby an ordinary person can secure his home from intrusion—is a type of police action which may be justified only by circumstances of compelling necessity. Society's interest in deterring this sort of police conduct outweighs its interest in securing the conviction of offenders by receiving the fruits of an otherwise lawful search. (We assume throughout this discussion that the purpose of the entry is to make an arrest, with a warrant or on probable cause, or to execute a search warrant.)

An unannounced entry by opening an unlocked door, however, does not present the same risks to individual privacy or to the general security of persons in their homes. A homeowner's failure to lock his door is not wholly fortuitous. It must be given some weight in determining the extent to which the homeowner has signified his intention to require persons who have reason to be on his premises to state their business before crossing his threshold. In the case of entry by an officer, moreover, the reason for his being on the premises is to perform a task in which society has such a significant interest that the homeowner is denied perhaps the most fundamental element of his privacy—the right to refuse admittance. When an individual leaves his door unlocked, the only advantage

which the rule of announcement could afford him is, in practical effect, an opportunity to be summoned to the door to be presented with a request which he has no right to refuse.

Petitioner argues, however (Br. 26), that the right to privacy will not admit a distinction between locked and unlocked doors for purposes of applying the rule of announcement, because, by merely closing the door, an individual "has signified his intention to enjoy the privacy of his home and to admit only those persons who are invited." This argument is based on the premise that the function of the rule of announcement is to establish the conditions for non-permissive entry, but as we have shown, the rule is concerned only with forcible entry. An officer armed with an arrest warrant or acting on probable cause derives his "invitation" from the State, and the homeowner may not refuse to admit him.

The decision in *Keiningham* v. *United States*, 287 F. 2d 126 (C.A.D.C.), cited by petitioner, demonstrates the error in his argument. In that case, the court interpreted the words "break open" in Section 3109 as meaning "enter without permission" (*id.* at 130). Under the court's rewording of the rule of announcement, it merely permits an officer to enter without the consent of the owner, after he has asked for and has been denied permission. The implication of the court's holding is that the rule would be violated every time an officer entered, even if the door was fully open, without first asking the consent of the owner. But this has never been the law.[9a] The sheriff did not derive

[9a] See, *e.g.*, *Lloyd* v. *Sandilands*, 8 Taunt. 250, 129 Eng. Rep. 379 (1879); *Commonwealth* v. *Tobin*, 108 Mass. 426 (1871).

his right to enter without consent from the rule of announcement; that right is inherent in the warrant. Except where force is to be applied, the failure to ask for consent is as immaterial as the failure to obtain it.

In short, it is apparent that the right to privacy plays a far more limited role where there is no right to refuse entry. In such circumstances, the "right" is at most a safeguard against police conduct which is needlessly and seriously alarming or provocative. The absence of any force or violence in effectuating the entry greatly detracts from this danger. Equally important, as we point out below, a failure to give forewarning may serve other interests which make it reasonable, in a particular case, to refrain from making an announcement.

*2. In all events, the circumstances of the present case justified an entry without announcement*

Even if the rule of announcement should be held to apply to entry through an unlocked door, the situation here required the officers to act with particular circumspection, and it was not unreasonable for them to fail to make an announcement. The opinions in *Ker* v. *California, supra,* recognized that the rule of announcement, viewed as a Fourth Amendment protection, is subject to certain exceptions. The opinion of Mr. Justice Clark quoted (374 U.S. at pp. 39–40) from the California Supreme Court's opinion in *People* v. *Maddox,* 46 Cal. 2d 301, 306, 294 P. 2d 6, 9:

> Moreover, since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be

> interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose. (*Read* v. *Case,* 4 Conn. 166, 170 [10 Am. Dec. 110]; see Rest., 2 Torts, § 206, com. d.) Without the benefit of hindsight and ordinarily on the spur of the moment, the officer must decide these questions in the first instance.[10]

The opinion of Mr. Justice Brennan (374 U.S. at 47) recognized that the failure to make an announcement would be excused

> (1) [W]here the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which

[10] The California statute (Penal Code § 844, which is basically the same as 18 U.S.C. 3109) is regarded as a codification of the common law. The courts have held that compliance is not required if the circumstances show that the officer's peril would be increased or the arrest frustrated by demanding entrance and stating purpose. See also *People* v. *King*, 234 Cal. App. 2d 423, 44 Cal. Reptr. 500, certiorari denied, 384 U.S. 1026; *People* v. *Smith*, 63 Cal. 2d 799, 409 P. 2d 222; *People* v. *Potter*, 144 Cal. App. 2d 350, 300 P. 2d 889. A mere assertion that narcotics violators are normally on the alert to destroy incriminating evidence, however, is deemed insufficient to excuse announcement; the police must have some particular reason to enter in the manner chosen. *People* v. *Gastelo*, 432 P. 2d 706.

justifies the officers in the belief that an escape or the destruction of evidence is being attempted.

Other opinions have recognized that officers need not announce their purpose before conducting an otherwise authorized search if it would provoke the escape of the suspect or the destruction of critical evidence. *Katz* v. *United States,* 389 U.S. 347, 355 n. 16. Nor does the Fourth Amendment require officers to delay in the course of an investigation if to do so would endanger their lives or the lives of others. *Warden* v. *Hayden,* 387 U.S. 294, 298–299. See also Kaplan, *Search and Seizure—A No-Man's Land in the Criminal Law,* 49 Cal. L. Rev. 474, 502 (1961); Comment, *18 U.S.C. 3109—An Enigma in the Law of Search and Seizure,* 8 St. Louis U. L. J. 604 (1964); American Law Institute, *Restatement, Torts* (2d) § 206, comment d.

As noted at the outset of this argument, the circumstances preceding petitioner's arrest were developed at trial solely with reference to the claim that there was no probable cause for arrest. Since petitioner did not contend that the method of entry was improper, there was no reason for determining precisely whether there was a failure to make an announcement or for bringing out all of the facts which might have justified an unannounced entry. It is apparent, however, that the agents had exposed Jones to a substantial risk of harm if anything occurred to excite petitioner's suspicions. The electronic equipment, which was intended to be a lifeline to Jones, was itself a source of peril if, for any reason, it should be discovered. The potential danger to an untried

informer left little margin for error. After leaving Jones in the apartment with petitioner for about five minutes, the agents decided that they could not risk any further delay in making the arrest. The agents may have believed that petitioner's suspicions had been aroused by Jones, who testified that he was very nervous at the time. Announcement might have increased the danger to Jones and could also have put the officers themselves in peril. Whether or not the officers had a reasonable basis for belief that an emergency existed could well depend on facts not developed at trial because the issue was not raised. To the extent that the state of the record leaves the matter debatable, it suffices to say that petitioner is not entitled to benefit from his failure to make the claim of improper entry in the trial court.

### II. THE ARREST WITHOUT A WARRANT WAS VALID

Petitioner sought and was granted a writ of certiorari to consider the following question, as stated in his petition (Pet. 2):

> May a federal law enforcement officer enter a private apartment dwelling to make an arrest by opening a closed but unlocked door without first giving notice of authority and purpose and being refused admittance as required by United States Code, Title 18, Section 3109.

He now seeks review, not only of that question, but also of the question whether the search was unlawful because (Br. 2):

> the arrest and the resultant search were made without a warrant of any kind, at night, after an unconsented to entry into petitioner's home,

under circumstances which do not excuse the officer's failure to obtain a warrant.

Rule 23.1(c) of the Rules of this Court provide that only the questions set forth in the petition or subsidiary questions fairly comprised therein will be considered. The question whether a warrant should have been obtained is not subsidiary to the question whether there must be announcement before entering private premises to make an arrest. Requirements of announcement are substantially the same whether the officers' entry is to execute a search warrant or to make an arrest upon probable cause. *Miller* v. *United States*, 357 U.S. 301. A question as to manner of entry necessarily presupposes a right to enter.

In all events, the agents' failure to obtain a warrant did not invalidate the arrest. Customs agents have statutory authority to make arrests for narcotics offenses on probable cause,[11] and petitioner does not appear seriously to contend that there was a lack of probable cause to arrest him. Since the search was incident to a lawful arrest, its validity does not depend upon the practicability of procuring a warrant. See *United States* v. *Rabinowitz*, 339 U.S. 56, 66. It is not necessary to determine whether there was sufficient basis for a finding of probable cause at the

[11] 26 U.S.C. 7607. That authority exists even if there was time to get a warrant. *Dailey* v. *United States*, 261 F. 2d 870, 872 (C.A. 5), certiorari denied, 359 U.S. 969; *United States* v. *Davis*, 281 F. 2d 93, 97 (C.A. 7), reversed on other grounds, 364 U.S. 505; *Abramson* v. *United States*, 326 F. 2d 565 (C.A. 5), certiorari denied, 377 U.S. 957; *United States* v. *Monroe*, 205 F. Supp. 175 (E.D. La.), affirmed, 320 F. 2d 277, certiorari denied, 375 U.S. 991.

time petitioner contends the agents should have sought a warrant for his arrest. Although Jones was an informer whose reliability had theretofore been untested, the telephone call to the person whose nickname and phone number were written on a card found in Jones' wallet tended to confirm his account of his arrangement with petitioner for transporting the cocaine across the border. But even if this evidence would not have justified the issuance of an arrest warrant, the failure to seek a warrant did not affect petitioner's rights. If the commissioner had found the evidence insufficient, the warrant would have been denied. Although this disposition would have protected petitioner from an immediate arrest, it would not have required the agents to terminate their investigation. They properly could have proceeded, as they did, to seek confirmation of Jones' information by permitting him to deliver the cocaine and by concealing a transmitter on his person so that they could listen to his conversation with petitioner. When the agents heard petitioner ask Jones whether he had his package and whether he got "through the line" all right, probable cause was clearly established. At this point, it was surely not practicable to seek a warrant or to delay petitioner's arrest. *Husty* v. *United States,* 282 U.S. 694, 701.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ should be dismissed as improvidently granted or, in the alternative, that the judgment of conviction should be affirmed.

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APRIL 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968